JOBNAME: No Job Name PAGE: 1 SESS: 3 OUTPUT: Fri Nov 21 14:57:21 2014

Phan Chee Yong v Public Prosecutor

COURT OF APPEAL (KUCHING) — CRIMINAL APPEAL NO Q-05–297–11 OF 2011
AZAHAR MOHAMED, DAVID WONG AND ABANG ISKANDAR JJCA
11 MAY 2014

Criminal Procedure — Appeal — Appeal against conviction — Accused charged for murder — Identification of accused by witnesses via CCT — Whether identification irresistibly pointed to accused — Whether conviction safe — Whether there was merit on appeal — Whether trial judge erred

This was an appeal by the appellant/accused against the decision of the High Court in which the appellant was convicted for the charge of murder together with five others still at large. The deceased had met up with the appellant at a restaurant to iron out some misunderstanding emanated from a cock fight event during the day. Present at the restaurant was the brother ('PW6') and the son ('PW8') of the deceased. They were separated by two tables but both PW6 and PW8 had testified that their view of that table was not impeded and they were able to identify that the appellant was the one having a discussion with the deceased that evening. The discussion between the appellant and the deceased had become very loud where the appellant had pointed his finger at the deceased. At that point, a group of people armed with pieces of wood in their hands then rushed towards the deceased who immediately tried to run away from them. According to the evidence of PW6 and PW8, the appellant stabbed the deceased with a sharp object. The deceased after being stabbed ran to the back of the restaurant. PW6 followed the deceased to the back of the restaurant and found out that the deceased had sustained injuries and was sitting on the road with blood all over his shirt. The postmortem report stated that the deceased had sustained eight external injuries. The result of DNA test confirmed that the appellant's blood had matched the blood stains extracted by PW18. The prosecution had also tendered CCTV recording of the fight between the people on the night of the incident. From that recording, PW6 and PW8 had identified the appellant. Identification parade was also conducted by the police where PW6 identified the appellant as the person at the restaurant. The judge convicted the appellant of the charge of murder. Hence, the present appeal. The main plank of the appellant's argument was the identification of the appellant as the person who had inflicted the injuries on the deceased by PW6.

Held, dismissing the appeal; affirming the conviction and sentence:

JOBNAME: No Job Name PAGE: 2 SESS: 3 OUTPUT: Fri Nov 21 14:57:21 2014

(1) The trial judge had dealt with the evidence in great details. It is trite law that even when a witness is inconsistent in his or her evidence this would not in law make the whole of that evidence unreliable or ought to be rejected. In any event, PW6's evidence as correctly pointed out by the trial judge had been adequately corroborated by other evidence. Of immense significance was the fact that he was at the scene of the incident and taking that into account with other evidence, such as PW8's evidence, the presence of the blood of the appellant and the images from the CCTV, there was no appealable error in the trial judge concluding that PW6's evidence was believable and could be used to sustain a conviction (see para 17).

(2) There was no sign of the prosecution case as being 'incredible or of a romancing nature' and thus there is no reason for us to apply the exception to the general rule (see para 19).

(3) The trial judge had correctly taken into consideration the unsworn statement of the appellant and had deliberated on the weight to be given to that unsworn statement. That approach was established law. The right to make an unsworn statement was a substantive right and that substantive right will be rendered meaningless or hollow, by not subjecting it to the appropriate judicial appreciation by the judge. The court must consider that unsworn statement in the context of the entirety of the evidence before the court as was done by the judge who found that his unsworn statement did not advance the cause of the appellant (see para 20).

(4) The trial judge, having considered that unsworn statement of the appellant in the context of the entirety of the evidence before him, had found that his unsworn statement had not advanced the cause of the appellant. There was nothing amiss in the manner in which he had directed himself with regard to his appreciation of the appellant's unsworn statement made from the dock (see para 22).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu/tertuduh terhadap keputusan Mahkamah Tinggi di mana perayu disabitkan atas tuduhan permembunuh bersama lima orang lagi yang masih bebas. Si mati telah berjumpa dengan perayu di restoran untuk menyelesaikan salah faham yang berpunca daripada kejadian laga ayam jantan semasa siang harinya. Hadir di restoran tersebut adalah abang ('PW6') dan anak lelaki ('PW8') si mati. Mereka terpisah oleh dua meja tetapi kedua-dua PW6 dan PW8 telah memberi keterangan bahawa penglihatan mereka terhadap meja tersebut tidak diganggu dan mereka dapat mengenal pasti bahawa perayu salah seorang yang berunding dengan si mati pada malam tersebut. Perundingan antara perayu dan si mati menjadi bertambah kuat di mana perayu telah mengarahkan jarinya kepada si mati. Pada ketika itu,

JOBNAME: No Job Name PAGE: 3 SESS: 3 OUTPUT: Fri Nov 21 14:57:21 2014

A sekumpulan orang bersenjatakan kayu di tangan mereka kemudiannya berlari menuju ke arah si mati yang dengan segera mencuba untuk melarikan diri daripada mereka. Mengikut keterangan PW6 dan PW8, perayu menikam si mati dengan objek yang tajam. Si mati selepas ditikam berlari ke belakang restoran. PW6 mengikut si mati ke belakang restoran dan mendapati bahawa si B mati telah mengalami kecederaan dan sedang duduk di atas jalan dengan darah mengalir terdapat di bajunya. Laporan bedah siasat menyatakan bahawa si mati telah mengalami lapan kecederaan luaran. Keputusan ujian DNA mengesahkan bahawa darah perayu sepadan dengan kesan darah yang diekstrak oleh PW18. Pihak pendakwaan juga mengemukakan rakaman C CCTV mengenai pergaduhan di antara orang ramai pada malam kejadian tersebut. Daripada rakaman tersebut, PW6 dan PW8 telah mengenal pasti perayu. Perbarisan kawad cam juga dijalankan oleh polis yang mana PW6 mengenal pasti yang perayu sebagai orang yang berada di restoran tersebut. D Hakim mensabitkan perayu terhadap tuduhan pembunuhan tersebut. Maka, rayuan ini. Teras utama hujahan perayu adalah pengenalpastian perayu sebagai orang yang menyebabkan kecederaan atas si mati oleh PW6.

Diputuskan, menolak rayuan; mengesahkan sabitan dan hukuman:

E (1) Hakim perbicaraan telah mempertimbangkann keterangan dengan terperinci. Adalah undang-undang nyata bahawa walaupun saksi tidak konsisten dalam keterangannya ini tidak akan daripada segi undang-undang membuatkan keseluruhan keterangan tersebut tidak boleh dipercayai atau patut ditolak. Walau bagaimananpun, keterangan F PW6 seperti yang ditunjukkan secara betul oleh hakim perbicaraan telah disokong dengan wajar oleh keterangan lain. Yang ketara adalah fakta bahawa dia berada di tempat kejadian dan dengan mengambil kira dengan keterangan lain, seperti keterangan PW8, kewujudan darah perayu dan imej daripada CCTV, tiada terdapat kesilapan rayuan dalam G dapatan hakim perbicaraan memutuskan bahawa keterangan PW6 boleh dipercayai dan boleh diguna pakai untuk mengekalkan sabitan (lihat perenggan 17).

(2) Tidak terdapat tanda kes pihak pendakwaan sebagai 'incredible or of a romancing nature' dan oleh itu tiada alasan untuk mahkamah mengguna H pakai pengecualian kepada peraturan am (lihat perenggan 19).

(3) Hakim perbicaraan telah secara betul mempertimbangkan pernyataan tidak bersumpah perayu dan telah mempertimbangkan ke atas berat untuk diberikan kepada pernyataan tidak bersumpah. Pendekatan I tersebut adalah undang-undang yang ditetapkan. Hak untuk membuat pernyataan tidak bersumpah adalah hak substantif dan hak substantif tersebut akan menjadi tidak bermakna atau tidak bererti, dengan tidak memberikannya penilaian kehakiman yang wajar oleh hakim. Mahkamah mesti mempertimbangkan bahawa pernyataan tidak

JOBNAME: No Job Name PAGE: 4 SESS: 3 OUTPUT: Fri Nov 21 14:57:21 2014

bersumpah dalam konteks keseluruhan keterangannya di hadapan mahkamah seperti yang dilakukan oleh hakim yang mendapati bahawa pernyataan tidak bersumpahnya tidak mengemukakan sebab perayu (lihat perenggan 20).

(4) Hakim perbicaraan, setelah mempertimbangkan bahawa pernyataan tidak bersumpah perayu dalam konteks keseluruhan keterangan di hadapannya, telah mendapati bahawa pernyataan tidak bersumpahnya tidak mengemukakan sebab perayu. Tidak terdapat apa-apa yang tertinggal dalam cara di mana beliau mengarahkan dirinya berkaitan penilaiannya terhadap pernyataan tidak bersumpah perayu yang dibuat daripada kandang orang salah (lihat perenggan 22).]

Notes

For cases on appeal against conviction, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 220–287.

Cases referred to

Mohamed Salleh v PP [1969] 1 MLJ 104; [1968] 1 LNS 80, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Penal Code ss 34, 302
Courts of Judicature Act 1964 s 18(2)

Appeal from: Criminal Trial No 45–01 of 2010 (MR) 1 (High Court, Miri)

Shankar Ram (Keith H Chin with him)(Thomas, Shankar Ram & Co) for the appellant.
Muslin Ab Hamid (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant/accused against the decision of the High Court in which the appellant was convicted for the charge of murder together with five others still at large of one Liu Kui ('deceased').

[2] On 4 December 2013, we heard the appeal and after giving due consideration to the evidence adduced in the trial court and submissions by respective counsel, we dismissed the appeal. We now give our grounds for that decision.

JOBNAME: No Job Name PAGE: 5 SESS: 3 OUTPUT: Fri Nov 21 14:57:21 2014

A BACKGROUND FACTS

[3] The detailed facts have been set out in the learned judge's grounds and we don't intend to repeat them here. For the purpose of this appeal we will only set out in brief the relevant facts required for our grounds.

B

[4] The deceased succumbed to injuries sustained on the night of 19 October 2009. The circumstances which the injuries were sustained are these. On that evening around 10pm the deceased met up with the appellant at a restaurant by the name of Chong Fa Seafood in the city of Miri. The purpose of the meeting was to iron out some misunderstanding emanated from a cock fight event during the day.

C

[5] Present at the restaurant was the brother ('PW6') and the son ('PW8') of the deceased. Both of them were requested to be present at the restaurant by the deceased. Both of them were seated at a different table of that of the deceased and the appellant. They were separated by two tables but both PW6 and PW8 had testified that their view of that table were not impeded and they were able to identify that the appellant was the one having a discussion with the deceased that evening. Present on the table of the deceased and the appellant were also other people which were not identified during the trial. PW6 also had prior to the commotion had gone over to the table of the deceased and saw for himself the appellant who was known as 'Ah Wai'.

D

E

F **[6]** At one point, the discussion between the appellant and the deceased had become very loud where the appellant had pointed his finger at the deceased. According to the evidence of PW6 and PW8, during that loud discussion which in effect was a quarrel, a group of people armed with pieces of wood in their hands rushed towards the deceased who immediately tried to run away from them. Unfortunately, the deceased was not successful in his attempt to flee and as such was attacked by that group of people and the appellant. According to the evidence of PW6 and PW8, the appellant had stabbed the deceased with a sharp object.

G

H **[7]** PW8 in an attempt to help and save his father, the deceased, was attacked himself and sustained some injuries. The deceased after being stabbed ran to the back of the restaurant. PW6 followed the deceased to the back of the restaurant and found out that the deceased had sustained injuries and was sitting on the road with blood all over his shirt. PW8 then used his car with the help of PW15 to take his father to Columbia Asia Hospital and was pronounced dead by PW11, the doctor in attendance at the hospital.

I

[8] Post mortem was conducted on the deceased by Dr Jamil bin Dolkadir. The postmortem report states that the deceased had sustained eight external

JOBNAME: No Job Name PAGE: 6 SESS: 3 OUTPUT: Fri Nov 21 14:57:21 2014

injuries and the cause of death was left haemothorax due to a stab wound to the left chest penetrating the left lung. Four of those injuries were defensive injuries.

[9] The investigating officer ('PW18') had extracted from the crime scene some blood stains and sent them for DNA testing to the Chemistry Department, Kuching. The result of the DNA test confirmed that the appellant's blood had matched the blood stains extracted by PW18.

[10] The prosecution had also tendered CCTV recording of the fight between the people on the night of the incident. From that recording, PW6 and PW8 had identified the appellant as the one wearing a jacket. Identification parade was also conducted by the police where PW6 identified the appellant as the person at the restaurant.

HIGH COURT GROUNDS

[11] The learned judge from the outset properly set out the relevant elements to be proved for the charge of the murder and they are as follows:

(a) Ling Kui is the deceased;

(b) Ling Kui died due to injuries found on him; and

(c) The injuries found on Ling Kui's body were inflicted by the appellant together with five others still at large in furtherance of their common intention to kill the deceased.

[12] In respect of element one and two, it is our view that the evidence is quite conclusive and the learned judge was entirely correct to conclude that the prosecution had proven them. Our view is also fortified by the fact that learned counsel for the appellant had not submitted on these aspects of the case.

[13] As for element three, the learned judge said this:

> 20. Did PW6 and PW8 correctly identify the accused as the person who inflicted the injuries, which caused the death of the deceased? An identification parade was held on 30 October 2009 at about 4.40pm at the Miri Central Police Station for PW6 and PW8 to separately identify a person who was suspected to be involved in the fight which resulted in the death of the deceased. ASP Zainan Azili Abdul Latiff ('PW13') conducted the identification parade and prepared a report which was tendered as exh P40. The evidence showed that PW8 was not able to identify the accused as the person who was involved in the fight or who stabbed the deceased on 19 October 2009 during the identification parade. Therefore, his identification of the accused in court on 11 May 2010 during the trial, some seven months after he failed to do so at the identification parade, was suspect and not reliable.

JOBNAME: No Job Name PAGE: 7 SESS: 3 OUTPUT: Fri Nov 21 14:57:21 2014

21. PW6 was able to and did identify the accused as the person who stabbed the deceased during the identification parade. He also identified the accused during the trial. The defence submitted that the identification of the accused by PW6 was not credible as he was not able to positively state the description of the accused except that the accused was wearing a white jacket. Moreover, it was submitted that PW6 had never met the accused before the incident. It was also submitted that the police report ('P13') which was lodged by PW6 shortly after the incident, did not state that the accused was wearing a white jacket and that his subsequent identification of the accused as the person wearing a white jacket was flawed and not reliable.

22. The evidence showed that the lighting at the corridor at the front of the restaurant where the deceased ie, his brother was seated was very bright. When PW6 arrived at the restaurant, he sat at another table at the same corridor, about 30 ft from where his brother was seated. PW6 said that he was watching the table where his brother was seated because when his brother telephoned him asking him to go to the restaurant, his brother had told him that his brother was going to negotiate a matter with somebody and he wanted to know who was that somebody.

23. PW6 testified that he saw the accused who was then wearing a white jacket had arrived in one of the seven to eight cars and approached his brother's table. The accused was the only person who wore a jacket that night and approached the table where his brother was seated. He testified that he saw and heard the accused and his brother talking loudly before the accused gave a signal. He then saw the group of people from the cars chased and attacked his brother and he saw the accused stabbed his brother with an object.

24. Although PW6 did not state that the accused was wearing a white jacket in the police report, he had named and referred to the accused as Ah Wai in the police report. The evidence showed that PW6 had positively identified the accused during the identification parade held on 30 October 2009 at CPS Miri, about ten days after the incident at the restaurant. His identification of the accused at the identification parade was confirmed by PW13 who was present at the identification parade. PW6 had also identified the accused in court. His identification of the accused was not based on a fleeting glimpse or an obstructed view of the accused or in poor lighting condition at the restaurant. He watched and saw the incident as it unfolded and saw what happened at the restaurant that night. He was about 30 ft away. It was without any doubt that the accused had gone to the restaurant that night to settle the dispute with the deceased and Ah Wai. This was confirmed by PW15. PW14 had taken a blood sample from the accused. The DNA analysis of this blood sample matched the DNA analysis of two blood swaps collected by the police at the road outside the restaurant on the night of the incident. It confirmed that the accused was present at the restaurant at the material times.

25. I have warned myself that PW6 was the brother of the deceased and of the danger of convicting the accused relying on the correctness of the identification of the accused made by PW6 and the possibility that his identification could be biased or mistaken: see *R v Turnbull & Ors* [1976] 3 All ER 549, *Erivesto Anderson & Anor v Public Prosecutor* [2009] 1 MLJ 593; [2008] 6 CLJ 453 and *Ahmad Najib Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800. I have examined the circumstances and the explanations of PW6 on his identification of the accused. I am satisfied with the quality of his identification and that his identification of the

JOBNAME: No Job Name PAGE: 8 SESS: 3 OUTPUT: Fri Nov 21 14:57:21 2014

accused was correct. The failure of PW8 to positively identify the accused at the identification parade did not detract from PW6's identification of the accused.

...

36. Exhibits P44 to P60, in particular P44, showed the recordings made by the CCTV cameras at the restaurant which included the recordings showing the fighting between the deceased and the group of persons including the accused at the front corridor of the restaurant. P44 contained moving video recordings from camera No 1 at the restaurant. It showed a group of about ten persons attacking the deceased who was holding a piece of wood at the front corridor of the restaurant.

37. It could be seen that among this group of persons was a man wearing a white jacket attacking the deceased. At footage 00.52 of this recording, the man in the white jacket was holding something in his right hand with which he stabbed the deceased's left chest. The face of this man was not facing the camera and could not be seen. As stated above, PW6 had identified this man in the white jacket as the accused. The recordings from the CCTV cameras at the restaurant only served to corroborate the evidence of PW6 about what happened at the restaurant on 19 October 2009 after 11pm.

38. From the evidence of PW3, the stab wound penetrated the left upper lobe of the lung causing the left haemothorax which caused the death of the deceased. From the nature of the wound to the chest and the lung, the accused together with the others, including the five persons still at large, in inflicting the stab wound did so either with the intention of causing death or with the intention of causing such bodily injury as the accused together with the others knew to be likely to cause the death of the deceased or with the intention of causing such bodily injury which was sufficient in the ordinary course of nature to cause death or with the knowledge that the act was so imminently dangerous that it must in all probabilities cause death and committed such an act without any excuse for incurring the risks of causing death or such an injury as aforesaid.

39. The evidence showed that the accused and the others including the five persons still at large went in several cars to the restaurant intending to settle the dispute between the deceased, Ah Wei and the accused. They went there armed with woods and knives. Similarly, the deceased was armed with a piece of wood. The evidence showed that during the fight the accused stabbed the deceased in the chest once with an object while the others had attacked him with the woods and knives which caused the injuries to the deceased which injuries were described in the post mortem report.

40. The evidence showed that the accused together with the other persons who are still at large had gone to the restaurant in several cars intending to settle the dispute between the deceased, Ah Wei and the accused. They went there armed with woods and knives. It was obvious they were ready and intended to fight. From the weapons carried and used in the fight, they were ready and intended to injure. The deceased was also armed with a piece of wood and had telephoned his brother and son to go to the restaurant. The evidence showed that PW6 and PW8 were seated at another table but were not armed.

41. The evidence showed that the accused approached the table where the deceased and Ah Wei were seated and they talked loudly. When they could not resolve the

JOBNAME: No Job Name PAGE: 9 SESS: 3 OUTPUT: Fri Nov 21 14:57:21 2014

dispute, the accused gave a signal and the others came from the cars. They together with the accused attacked the deceased with their weapons and inflicted the injuries on the deceased resulting in the death of the deceased. The evidence showed that there was a pre-arranged plan and that they acted in accordance to that pre-arranged plan. The attacks on the deceased by the accused and the five others which inflicted the injuries resulting in his death were pursuant to this pre-arranged plan.

42. Assuming that it was not the accused who inflicted this stab wound or the fatal wound on the deceased, the charge against the accused was that he together with the five others still at large committed murder by causing the death of the deceased under s 302 of the Penal Code read together with s 34 of the Penal Code. Section 34 provides that when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone. The crucial ingredient to prove common intention is the existence of a pre-concert or pre-planning or a pre-arranged plan and the criminal act complained of must have been done by one of the persons in furtherance of the pre-arranged plan or the common intention. The pre-arranged plan may develop on the spot or on the spur of the moment or during the course of the commission of the offence: *Lee Kwai Heong v Public Prosecutor* [2006] 2 MLJ 528; [2006] 1 CLJ 1043.

43. Section 34 is a rule of evidence and does not create a substantive offence: *Krishna Rao Gurumurthi v Public Prosecutor and Another Appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. Mens rea being a mental element or state of mind is not usually capable of being established by way of direct evidence. It can be gathered from indirect evidence in each particular case: see *Public Prosecutor v Roslizam bin Abdul Azis & Anor* [2005] 1 MLJ 261; [2004] 1 LNS 196, *Public Prosecutor v Azman Ismail & Another Case* [2007] 3 MLJ 628; [2007] 10 CLJ 469, *Public Prosecutor v Norazam Ibrahim* [2006] 8 CLJ 462 and *Krishna Rao Gurumurthi v PP and Another Appeal*.

44. After subjecting the evidence adduced by the prosecution to a maximum evaluation, the prosecution had made out a prima facie case against the accused. I called upon the accused to enter on his defence.

[14] The appellant did not testify under oath for his defence and made a statement from the dock. That statement has been set out in full in grounds of the learned judge. Suffice for us to say that the unsworn statement of the appellant in substance says that while he was there on the night of the incident, he was not responsible for the injuries sustained by the deceased and in fact one Ah Siang. According to the appellant when the attack on the deceased happened, he had left the scene with his car. The learned judge deliberated on the statement and concluded as follows:

51. ... The accused's version of what happened at the restaurant on 19 October 2009 at about 11pm was different from the version given by the prosecution witnesses, in particular by PW6 and PW15 who had testified that he was the one who talked loudly with the deceased. PW18 had said that Ah Siang was one of the five persons still at large. The accused's version was not put to the prosecution witnesses during

JOBNAME: No Job Name PAGE: 10 SESS: 3 OUTPUT: Fri Nov 21 14:57:21 2014

the case for the prosecution and it raised questions about the truth of his story and about his credibility, bearing in mind that it was not made under oath and not subject to cross-examination.

[15] Premised on the above findings, the learned judge convicted the appellant of the charge of murder.

GROUNDS OF APPEAL

[16] From the submissions of learned counsel for the appellant, we are of the view that the main plank of attack is the identification of the appellant as the person who had inflicted the injuries on the deceased by PW6. The complaints before us are similar to that before the High Court and they are these. The evidence of the PW6 is inconsistent in that his police report is not the same. Related to that, learned counsel submits that PW6 had been untruthful and that he is an interested witness in that he is related to the deceased. The CCTV evidence is not conclusive in that it did not show that it was the appellant who stabbed the deceased. The evidence of PW6 and PW8 was not corroborated. The identification parade was also flawed. The learned judge also erred in not concluding that it was a sudden flight.

[17] With respect, we see no merit in learned counsel's submissions as we have found that the grounds of the learned judge (which we have set out above) had dealt with the evidence in great details and had answered all the contentions raised by learned counsel. It is trite law that even when a witness is inconsistent in his or her evidence this does not in law make the whole of that evidence unreliable or ought to be rejected. In any event, PW6's evidence as correctly pointed out by the learned judge had been adequately corroborated by other evidence. Of immense significance is the fact that he was at the scene of the incident and taking that into account with other evidence, such as PW8's evidence, the presence of the blood of the appellant and the images from the CCTV, we see no appealable error in the learned judge concluding that PW6's evidence is believable and can be used to sustain a conviction.

[18] As for the appellant's defense, the failure to put one's defence must not be underestimated though not fatal. Instructive on this point is the case of *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 where Raja Azlan Shah CJ (Malaya) (as His Highness then was) declared:

> A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the creditability of their testimony ... On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as it is common with all general rules, there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in

JOBNAME: No Job Name PAGE: 11 SESS: 3 OUTPUT: Fri Nov 21 14:57:21 2014

Transport Ministry v Garry where Haslam J said at p 122:

> In Phipson on *Evidence* (11th Ed) para 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness testimony, viz, where ... the story is itself of an incredible or romancing character, or the abstention arises from mere motive of delicacy ... or when counsel indicates that he is merely abstaining for convenience, eg, to save time. And where several witnesses are called on the same point, it is not always necessary to cross examine them all'.

[19] We see no sign of the prosecution case as being 'incredible or of a romancing nature' and thus there is no reason for us to apply the exception to the general rule.

[20] Further, we are of the view that the learned judge had correctly taken into consideration the unsworn statement of the appellant and had deliberated on the weight to be given to that unsworn statement. That approach is, in our view established law. We also say so for the simple reason that the right to make an unsworn statement is a substantive right and that substantive right will be rendered meaningless or hollow, by not subjecting it to the appropriate judicial appreciation by the judge. The court must consider that unsworn statement in the context of the entirety of the evidence before the court as was done by the learned judge who found that his unsworn statement did not advance the cause of the appellant.

[21] In the case of *Mohamed Salleh v Public Prosecutor* [1969] 1 MLJ 104; [1968] 1 LNS 80, the accused person had elected to give an unsworn statement from the dock. On appeal, Wee Chong Jin CJ, had approved the direction given by the learned trial judge to the jury, which direction had been stated as follows: 'Of course, you must not reject the statement of the accused, you must consider it and give such weight as you think it is worth having regard to the other evidence that you have'.

[22] Reverting back to our instant appeal, we noted that the learned trial judge, having considered that unsworn statement of the appellant in the context of the entirety of the evidence before him, had found that his unsworn statement had not advanced the cause of the appellant. With respect, we found nothing amiss in the manner in which he had directed himself with regard to his appreciation of the appellant's unsworn statement made from the dock.

CONCLUSION

[23] The crux of this appeal is simply one of identification and also basically one that has revolved on the findings of fact by the trial judge. In our view those findings were premised on evidence that had been established and

JOBNAME: No Job Name PAGE: 12 SESS: 3 OUTPUT: Fri Nov 21 14:57:21 2014

corroborated. As such those findings cannot be said to be perverse or unreasonable and therefore they do not warrant any intervention by us.

[24] We are fully aware that the trial started with another judge with the present judge finishing it with consent from respective learned counsel and permitted by s 18(2)of the Courts of Judicature Act 1964. This had not caused any miscarriage of justice as the learned judge was not handicapped by the recorded evidence of the previous judge in fully and judicially appreciating and evaluating the evidence in its entirety as shown by us in our above analysis of the learned judge's reasonings. Hence we see no appealable error in his detailed and commendable analysis of the evidence before him. We found the conviction of the appellant safe.

Accordingly we had dismissed the appeal and had affirmed the conviction and sentence of the learned judge.

Appeal dismissed conviction and sentence confirmed.

Reported by Afiq Mohamad Noor